IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 967 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE A.L.DAVE

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ANANDKUMAR TAHELRAM HARCHANDANI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 967 of 2000

MR MJ BUDDHBHATTI for the appellant.

MR SA BAQUI for the appellant.

MR IM PANDYA, APP, for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE A.L.DAVE

Date of decision: 12/12/2003

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE A.L.DAVE)

1. This appeal arises out of a judgment and order rendered by learned Additional City Sessions Judge, Court No.4, Ahmedabad, on 28th September, 2000, in Sessions Case No.263 of 1997. The appellant came to be convicted by virtue of that judgment for offences punishable under Sections 20(b)(ii) and 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS Act" for short). He is sentencded to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1 lakh, in default, to undergo rigorous imprisonment for one year for the offence punishable under Section 20(b)(ii) of the NDPS Act. He is also sentenced to undergo further rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1 lakh, in default, to undergo further rigorous imprisonment for one year for the offence punishable under Section 21 of the NDPS Act. Both the sentences are ordered to run concurrently.

2. The facts of the case, in a narrow compass, can be stated thus:

2.1 Police Constable, Dilipbhai Chavada, of Narcotic Cell introduced one informer to Circle Inspector, Prakash Mahendrabhai Jadav, of Narcotic Cell. The said informer informed Circle Inspector, Jadav, that intoxicating tablets in the name of Sanan Manukka are being sold on a Pan Stall being run in the name of Prakash Pan Corner by Anand Sindhi, Near A.M.T.S. Bus Stand, Behind Vegetable Market, Khokhara. The information was reduced to writing, entry was made in the register and a detailed report was sent to Police Superintendent of Narcotic Cell. Two Panch witnesses as well as an expert from F.S.L. were summoned. They were informed about the proposed raid. A mutual search was conducted and no contraband was found. Thereafter, necessary material for sealing, etc. was collected and the raiding party headed for the place in question in two Government vehicles. The vehicles were stopped in front of the Pan Stall and the raiding party members got down from the vehicle and went to the Pan Stall. The person present at the Pan Stall was inquired of his identity, who introduced himself as Anand Tehalram Harchandani of 14/344, Municipal Slum Quarters. The members of the raiding party introduced themselves and P.I., Jadav, introduced himself as a Gazetted Officer. The said person was informed about the information that he is selling Sanan Manukka tablets in his shop, which are intoxicating

tablets and, therefore, a search was to be performed. He was given an option, whether he wanted the search to be conducted in presence of another Gazetted Officer or a Magistrate. This option was given in writing, which was denied by the said Anand Tehalram Harchandani. He was also given an option to search the person of the members of the raiding party, to which also he denied. He was asked to come out of the Stall and his person was searched, but nothing incriminating was found. Thereafter, the Stall was searched. A white container was found to contain green coloured pouch containing Sanan Munakka tablets 44 in number. Another pouch containing 90 tablets was also found. A third pouch containing Shiv Lahervati Tablets 100 in number was also found. One tablet from each of the pouches was removed and handed over to Scientific Officer, Mr. Pandya, and he opined that it contained intoxicating material and suggested that rest of the tablets be sent to laboratory for analysis. Therefore, five tablets from each of the pouches were removed, put in a plastic bag and were sealed. The material was seized. A Panchnama of the entire procedure was drawn. The said Anand Tehalram Harchandani was arested. The accused along with muddamal was forwarded to the Narcotic Cell and the muddamal was then, in turn, sent to F.S.L. for analysis. A report, as required under Section 57 of the NDPS Act, was made to superior officer as well as a report was sent to the Magistrate, in this regard. On the basis of the complaint which was lodged by P.I. Prakash Jadav, offence was registered and investigation made. Ultimately, having found that the tablets contained intoxicating contraband material, a charge sheet for offences punishable under the NDPS Act came to be filed and Sessions Case came to be registered.

2.2 The Trial Court framed charge against the accused-appellant, at Ex.1 on 12th January, 1998. The accused pleaded not guilty to the charge and claimed to be tried. The prosecution led the evidence against the accused and the learned Additional City Sessions Judge, Court No.4, Ahmedabad, after considering the evidence on record, came to a conclusion that the charges against the accused were established and, therefore, recorded a conviction and sentenced the accused, as stated above. Aggrieved by the said judgment and order, the original accused has preferred this appeal.

3. We have heard learned Advocate, Mr. Budhbhatti, for the appellant and learned Additional Public Prosecutor, Mr. Pandya, for the State. The record and proceedings of the Trial Court are before us and are

perused by us.

4. Learned Advocate, Mr. Budhbhatti, appearing for the appellant submitted that the case suffers from various defects. Mr. Budhbhatti submitted that the evidence of the F.S.L. expert does not establish that the material allegedly seized from the Galla of the appellant was psychotropic substance because no test in that regard was conducted, as admitted by prosecution witness No.3-Mr. M.C. Champaneri. He submitted that the tests performed by the expert giving positive results were not conclusive because the witness has admitted that even Unani or Ayurvedic medicines may also reveal such results. It is contended that no tests were performed to ascertain presence of narcotic or psychotropic substance other than charas and presence of of charas is not found in the material seized.

4.1 Mr. Budhbhatti submitted that the appellant-accused runs a Pan Shop. The tablets are manufactured in Madhya Pradesh under a licence by an independent manufacturer, having no nexus with the appellant. The pouches found with the appellant were in sealed condition and the ingredients of the contents printed thereon by the manufacturer did not indicate presence of any contraband material to be part of the ingredients. The appellant, therefore, cannot be said to be in conscious possession of the contraband.

4.2 Mr. Budhbhatti submitted that the F.S.L. report does not indicate exact quantity of the contraband. It indicates gross weight of the tablets, and what was the percentage of the alleged contraband and what was the proportionate quantity of contraband, as an ingredient of those tablets, are not revealed in the evidence and, therefore, it could be a negligible quantity. Mr. Budhbhatti submitted that provisions contained under Sections 79 and 95 of the Indian Penal Code would also be relevant factors. Mr. Budhbhatti submitted that there are erasures and overwritings in the name of the accused and the date of the raid in the police record. He submitted that though there was specific information that the Stall owner sells such contraband articles, no decoy trap was arranged and, therefore, the proceedings as indicated in the deposition by the witnesses may not be accepted at the face value. Mr. Budhbhatti urged that the appeal may be allowed.

5. Learned Additional Public Prosecutor, Mr. Pandya, has opposed this appeal. He submitted that the investigation has been properly conducted. The F.S.L.

experts are independent witnesses and have no reason to tell a false story. The F.S.L. witness examined as a defence witness indicates that the material seized was a cotraband containing Tetrahydrocannabinol. This has been deposed to by the F.S.L. experts examined both by the prosecution as well as the defence and this is a psychotropic substance. Mr. Pandya submitted that the appellant is involved in sale of such a drug which affects a large section of the society and, therefore, a strict view of the matter may be taken. The Trial Court cannot be said to have committed any error in recording conviction. He submitted that required tests were performed and looking to the formula of the tablets, it did not fall within the specific definition of charas, Ganja or other material, but it is clearly revealed that it is derivative of cannabis. He, therefore, urged that the appeal may be dismissed.

6. We have examined the record and proceedings from the angles suggested by the learned Advocate for the appellant and the learned Additional Public Prosecutor.

6. At the outset, it may be noted that receipt of information, it being reduced to writing and passed over to superior, followed by a raid in presence of Panch witnesses, seizure of the material in question, arrest of the accused, sending of report of arrest and seizure, and sending of muddamal to F.S.L are not disputed by the appellant, in any manner, least on any technical aspect.

6.1 It would be appropriate to note that the amendment to NDPS Act by virtue of Act No.9 of 2001 came into force on 2.10.2001, i.e. during the pendency of this appeal and, therefore, the reference to NDPS Act in this judgment is with reference to NDPS Act, as it stood prior to the amendment.

7. The main conention is the defect in the opinion about the material being psychotropic substance and doubt arising therefrom.

7.1 The prosecution has examined Masheshchandra Chhbildas Champaneria as P.W.3, at Ex.28. He is the Scientific Officer of F.S.L. He deposes about the receipt of sealed packets of Sanan Manukka and Shiv Lahervati and having analysed the tablets, he states that there are different types of cannabinoids which include cannabinol, cannabidiol and tetrahydrocannabinol. Cannabinoids are narcotic drugs as well as psychotropic substance. Tetrahydrocannabinol is listed at Sr. No.13 in the Schedule of Psychotropic Subtances in the NDPS

Act. Such substance leads to intoxication.

7.1.1 During cross-examination, he says that he had himself analysed the muddamal article while being assisted by his assistant. He is unable to say as to what was the quantity of isomiter in tetrahydrocannabinol. He admits that he has not indicated isomals in the Schedule. In his further cross-examination, he admits that the packets of muddamal article indicated manufacturing licence number. He also admits that the ingredients of the packet were also stated on it along with their proportionate weight or quantity. He states that the laboratory did not have the facility of testing those ingredients. He also admits that he had never analysed those ingredients earlier. He admits that he had not conducted any other analysis except for narcotic drug. He also admits that he had not conducted any tests to examine presence of narcotics other than charas. He admits that the results revealed out of the analysis may also be indicated in analysis of Unani and Ayurvedic medicines. The witness says that, after examining the ingredients of the contents of the packet, he did not feel it necessary to perform any further tests in that regard.

7.2 It is, thus, clear from the deposition of this witness that he had conducted tests only to examine presence or otherwise of narcotics. Differently put, no tests were performed for testing presence of psychotropic substance. In fact, he admits that he had tested the material only to check the presence or otherwise of charas. He also admits that even Ayurvedic or Unani medicines may give similar results. More important part is that, even after examining the ingredients of the contents of the packet, he did not feel it necessary to perform any further tests in respect of those contents, meaning thereby that none of the ingredients was either narcotic or psychotropic substance or any prohibited item.

7.2.1 It would be appropriate, at this stage, to note that the F.S.L. report (Ex.29) prepared by the above witness indicates that the tests indicated presence of cannabinoids in the sample, but the exact quantity of such cannabinoids in the sample is not indicated. What is indicated is the net weight of the tablet, which include weight of other ingredients of the tablet and, therefore, there is total lack of evidence to know the exact quantity of the alleged contraband in the material seized.

8. The defence has examined witness-Mahendrasinh Jageram Dahaiya. He is a witness, who has not examined the material seized in the present case, but in an earlier case, he had examined Sanan Manukka and Mastan Manukka and had prepared a report and had deposed in the Court earlier. He states in his deposition that in his deposition in the earlier case, he had opined that the material found from the said tablets cannot be said to be charas, as defined under the NDPS Act. He also states that mere presence of cannapithinol would not indicate presence of charas, as defined under the NDPS Act. During cross-examination to the learned Additional Public Prosecutor, the witness admits that, in the material examined by him in the earlier case, he had found presence of tetrahydrocannabinol, cannabidiol and cannabinol and had opined that they are natural materials and these natural materials fall within the definition of psychotropic substance and is indicated at item No.13 of the Schedule of Psychotropic Substances in the NDPS Act. On the basis of this evidence, it was vehementally argued by learned Additional Public Prosecutor, Mr. Pandya, that the material, in the instant case, is a psychotropic substance.

8.1 In our opinion, it has to be remembered that this witness has not examined the material seized in the instant case. There is no evidence to indicate that the material seized in the instant case and the material seized in the earlier case, wherein this witness had examined the material, were manufactured by the same manufacturer and that there was no change in the formula, except that, in both the cases, the material seized was branded as Sanan Manukka. There is no material to indicate that the contents in both the cases were identical or can be safely inferred to be identical. The deposition of this defence witness cannot help the appellant either.

9. It would also be appropriate to note that the case against the appellant is that sealed packets of Sanan Manukka and Shiv Lahervati were found from his Stall. He is nowhere indicated to be connected with manufacture of the material. There is no material to point out that the licence number indicated on the pouch is either false. There is no material to show that sale of this manufactured brand of material is prohibited in the State of Gujarat. It is, thus, risky to infer knowledge on part of accused about possession of contraband. The Court also cannot remain indifferent towards the age of the accused and the business in which he is engaged nor can it be overlooked that market is

flooding with variety of eating materials packed in pouches and sachets.

10. The ultimate outcome of the above discussion can, briefly, be stated as under :-

(1) The appellant is, at the most, found to be possessing sealed packets of Sanan Manukka and Shiv Lahervati, claimed to have been manufactured under a licence in the State of Madhya Pradesh, the contents of which are claimed to be Ayurvedic or Herbal material to serve the purpose of mouth freshner, which are commonly used by people fond of Pan or otherwise.

(2) Thereis no material to indicate that the accused was, in any manner, connected with manufacture of the material seized or with the manufacturer of the material seized.

(3) The pouches were sealed and indicated over them the ingredients of the contents of the pouches, none of which was any prohibited item and, therefore, even the F.S.L. expert did not deem it necessary to enter into the tests of those materials.

(4) The F.S.L. expert has admitted that the results indicated in the tests performed over the material may also be the results in some Unani or Ayurvedic medicines.

(5) There is total lack of evidence to indicate the exact quantity of the alleged contraband present in the material seized.

(6) The Scientific export of F.S.L. has not performed the tests other than the tests for presence of narcotics. He even admits that he has not performed any tests to know presence of any other narcotics than charas and presence of charas is not indicated in the F.S.L. report. The alleged presence of alleged contraband cannot be accepted as authentic and reliable.

11. All these factors, collectively, lead us to conclude that the prosecution cannot be said to have established the case against the accused beyond reasonable doubt. We also consider that the appellant is a young boy of about 20 years of age, engaged in running a Pan Stall and keeping such pouches, apparently not

indicating the contents to be any prohibited item, would be a normal conduct. Under the circumstances, in our opinion, the Trial Court has committed an error in concluding that the prosecution has established the guilt of the accused and has committed an error, consequently, in recording conviction and sentencing the accused. The judgment and order of the Trial Court, therefore, cannot be permitted to stand.

12. In the result, the appeal is allowed. The judgment and order of conviction and sentence recorded by the learned Additional City Sessions Judge, Court No.4, Ahmedabad, in Sessions Case No.263 of 1997, dated 28th September, 2000, is hereby set aside. The appellant-accused is acquitted of the charges framed against him by giving benefit of doubt. He be set at liberty forthwith, if not required in any other case. Fine, if paid, be refunded to him. Muddamal to be disposed of as per direction of the Trial Court.

[KSHITIJ R. VYAS, J.]

[A. L. DAVE, J.]

gt